

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
CANADIAN IMPERIAL BANK OF COMMERCE,	:	DETERMINATION
CANADIAN IMPERIAL BANK OF COMMERCE - NEW YORK	:	DTA NOS. 810520,
AND CANADIAN IMPERIAL HOLDINGS, INC.	:	810521, 811924
	:	AND 811925
for Redetermination of Deficiencies or for	:	
Refund of Franchise Tax on Banking Corporations	:	
under Article 32 of the Tax Law for the Fiscal	:	
Years Ended October 31, 1989 and October 31,	:	
1990.	:	

Petitioners, Canadian Imperial Bank of Commerce, Canadian Imperial Bank of Commerce - New York and Canadian Imperial Holdings, Inc., 425 Lexington Avenue, New York, New York 10017, filed petitions for redetermination of deficiencies or for refund of franchise tax on banking corporations under Article 32 of the Tax Law for the fiscal years ended October 31, 1989 and October 31, 1990.

On November 9, 1992 and November 12, 1992, respectively, petitioners, represented by Sullivan & Cromwell (Pamela J. Case, Esq., of counsel), and the Division of Taxation, represented by William F. Collins, Esq. (John O. Michaelson, Esq., of counsel), consented to have the controversy determined on submission without hearing with all briefs due by March 12, 1993. The Division of Taxation submitted documentary evidence and a list of documents dated November 13, 1992. Petitioners (by Pamela J. Case, of counsel) submitted their brief on January 12, 1993. The Division of Taxation submitted its brief on January 26, 1993 and petitioners (by Andrew S. Mason, of counsel) submitted their reply brief on March 11, 1993. After due consideration of the record, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners are entitled to the eligible business facility tax credit for a newly-

located facility that was a successor to facilities which had received initial approval from the Job Incentive Board.

FINDINGS OF FACT

The parties entered into an agreement, dated October 29, 1992, stipulating to the facts in this case. The stipulated facts have been adopted as Findings of Fact "2" through "36". Findings of Fact "29" and "37" through "41" contain additional findings of fact.

Prior to 1981, Canadian Imperial Bank of Commerce, a commercial bank organized under the laws of Canada ("CIBC"), managed its United States operations from its headquarters office in Toronto, Ontario.

In 1981, as part of an effort to expand its business in the United States, CIBC decided to establish a United States headquarters office (the "U.S. Operating Office") for the purpose of managing its existing U.S. operations and overseeing the expansion of its business in the United States.

At the time of its decision to establish the U.S. Operating Office, CIBC had existing operations in California, Georgia, Illinois, Pennsylvania, Washington, Oregon and New York.

CIBC considered several alternative locations as the situs of the U.S. Operating Office, but ultimately selected New York City, where CIBC's wholly-owned subsidiary, Canadian Imperial Bank of Commerce Trust Company (later renamed Canadian Imperial Bank of Commerce [New York] ["CIBC-NY", and, together with CIBC, "petitioners"]), had been operating since 1951.

A material factor in CIBC's decision to establish the U.S. Operating Office in New York, rather than in any of the other states where CIBC had operations at the time, was the availability of the eligible business facility ("EBF") tax credit under Article 32 of the Tax Law to commercial banks that chose to locate and expand in "eligible areas" in New York.

On March 30, 1982, petitioners submitted a joint application, prepared on a consolidated basis, to the New York State Job Incentive Board ("JIB") for initial approval for EBF tax credits with respect to their operations at three locations in New York City: 237 Park Avenue,

245 Park Avenue and 20 Exchange Place/22 William Street (the "Original Facilities").

On April 29, 1983, at the request of the JIB, petitioners submitted revised applications, prepared on a separate company basis, for approval for EBF tax credits with respect to their operations at the Original Facilities.

In submitting their revised applications for EBF tax credits, petitioners wrote the following to the JIB:

"Commercial banks located in New York City are subject to the highest tax rates for any business taxpayer in the country. From 1975 to the present, the combined rate has exceeded 25% of taxable income (current State and City tax rates are 14.16% and 13.823%, respectively). As a result, incentives such as the franchise tax credits granted by the Job Incentive Board are necessary to encourage banks such as Canadian Imperial to locate in New York

"Canadian Imperial Bank previously managed its United States operations from its headquarters in Toronto. Recently a decision was made to relocate the management to the United States in conjunction with a major effort that was being undertaken to expand the Bank's business in the United States. New York City was selected as the location of this new management group over our other branch locations in California, Illinois, Pennsylvania, Washington and Oregon. As a result of our expansion, it is anticipated that we will increase our employment in New York by approximately 50% in the aggregate to 300 personnel."

In June 1983, the JIB granted initial approval to petitioners for EBF tax credits with respect to their operations at the Original Facilities.

CIBC-NY first began claiming EBF tax credits in its fiscal year ended October 31, 1983. In each fiscal year through October 31, 1988, CIBC-NY claimed EBF tax credits on the basis of renewed certificates or eligibility with respect to its operations at the Original Facilities as follows:

<u>Fiscal Year</u>	<u>JIB No.</u>	<u>Affidavit of Compliance Filed</u>	<u>Certificate Received</u>
10/31/83	185-01	6/29/84	8/24/84
10/31/84	185-02	6/21/85	7/26/85
10/31/85	185-03	7/03/86	8/14/86
10/31/86	185-04	9/10/87	
		(Revised 9/17/87)	2/19/88
10/31/87	185-05	7/15/88	8/09/88
		(Revised 8/25/88)	9/14/88 (Rev)
10/31/88	185-06	9/08/89	9/21/89

CIBC first began claiming EBF tax credits in its fiscal year ended October 31, 1984. In

each fiscal year through October 31, 1988, CIBC claimed EBF tax credits on the basis of renewed certificates of eligibility with respect to its operations at the Original Facilities as follows:

<u>Fiscal Year</u>	<u>JIB No.</u>	<u>Affidavit of Compliance Filed</u>	<u>Certificate Received</u>
10/31/84	234-01	6/21/85	7/31/85
10/31/85	234-02	6/30/86	8/14/86
10/31/86	234-03	9/04/87 (Revised 9/17/87)	1/11/88
10/31/87	234-04	7/15/88	9/14/88
10/31/88	234-05	9/14/89	9/27/89

Between 1981 and 1988, the total number of CIBC-NY employees at the Original Facilities increased from 30 to 106, representing a net increase of 76 jobs over the number of jobs reported on its original application to the JIB.

Between 1981 and 1988, the total number of CIBC employees at the Original Facilities increased from 174 to 406, representing a net increase of 232 jobs over the number of jobs reported on its original application to the JIB.

By 1988, petitioners had together created over 300 new jobs at the Original Facilities, or three times the number of jobs petitioners predicted they would create when they first applied to the JIB for EBF tax credits.

To accommodate the substantial number of jobs created during this period, petitioners more than doubled the total office space they occupied at the Original Facilities, with most of the expansion occurring at the Park Avenue locations. By 1988, the total square footage occupied by petitioners at the Original Facilities stood at 135,127, compared to 63,864 square feet in March 1982, the time of their original application to the JIB.

Despite the considerable expansion undertaken by petitioners at the Original Facilities, the increase in employment levels far exceeded the available space at the Original Facilities, and, by 1987, petitioners faced an acute shortage of space. The facility at 237 Park Avenue, where petitioners occupied approximately two floors, was already fully occupied and no further space was available. Although petitioners were able to obtain certain additional blocks of space

at 245 Park Avenue, the space was not contiguous with petitioners' existing office space at that location and was highly undesirable due to the fact that large sections of the building were undergoing asbestos removal. Petitioners could not expand at the 20 Exchange Place/22 William Street location because it was already fully occupied. Moreover, due to antiquated support systems and technologically obsolete wiring, the 20 Exchange Place/22 William Street location was not structurally amenable to necessary upgrading and enhancement of computer and data processing facilities.

Despite petitioners' efforts to provide an effective and productive work environment for their employees, the crowded conditions at the Original Facilities placed significant burdens on petitioners' operations and employees.

In order to maximize available work space at the Original Facilities, petitioners were required to convert file rooms, conference rooms and even a portion of the employee cafeteria into makeshift offices. Despite these measures, however, some employees had to be stationed in rows of desks set up in hallways.

Petitioners encountered particular hardship at the 245 Park Avenue location, where the lack of contiguous space, makeshift accommodations and crowded conditions so overburdened existing telephone capacity that petitioners were forced to make a substantial investment in a new telephone switch in order to provide adequate communications coverage. In addition, petitioners were effectively precluded from making any structural or physical improvements to their office space at that location because any such improvements would have entailed costly asbestos removal and would have required the temporary transfer of employees to yet another location.

As a possible solution to the space problem at the Original Facilities, petitioners' landlord at the Park Avenue locations offered petitioners alternative office space that an affiliate was completing at a nearby location. This office space, located at 425 Lexington Avenue (the "Lexington Avenue Premises"), offered more than 235,000 square feet of contiguous office space, which was nearly 100,000 square feet more than the space available to petitioners at the

Original Facilities.

After some deliberation, petitioners eventually decided to accept their landlord's offer to move to the Lexington Avenue Premises because this not only offered a solution to the current space problem but also would allow further expansion of petitioners' operations according to industry conditions. Because employment levels at the Original Facilities already far exceeded the capacity of the Original Facilities, the Original Facilities could not accommodate any further growth.

In late 1988, petitioners transferred all of their operations and employees to the Lexington Avenue Premises.

The Lexington Avenue Premises are located in the borough of Manhattan in the City of New York, the same eligible area in which the Original Facilities were located.

As of October 31, 1989, after giving effect to the relocation, the Lexington Avenue Premises houses 369 employees of CIBC and 99 employees of CIBC-NY, representing a net increase of 195 jobs and 69 jobs, respectively, over CIBC's and CIBC-NY's original applications to the JIB.

As of October 31, 1990, the Lexington Avenue Premises housed 398 employees of CIBC and 50 employees of CIBC-NY, representing a net increase of 224 jobs and 20 jobs, respectively, over CIBC's and CIBC-NY's original applications to the JIB.

Throughout fiscal 1989 and 1990, numerous job training programs were offered for the employees of CIBC and CIBC-NY at the Lexington Avenue Premises, including educational and training seminars on value planning, restructuring and special industry issues, consulting, negotiating and selling strategies, computer and word processing skills, and teamwork and communications skills.

On August 21, 1990, petitioners each submitted an Affidavit of Compliance for a Certificate of Eligibility of EBF tax credits for the fiscal year ended October 31, 1989 (the "1989 fiscal year").

By letters dated September 10, 1990, the New York State Division of Taxation (the

"Division") denied petitioners' requests for EBF tax credits on the grounds that "the location 425 Lexington Avenue, New York, New York, was not an approved facility." The letter further related the following:

"Section 210(11)(h) of the New York State Tax Law empowered the State Tax Commission on or after April 1, 1983 to issue a Certificate of Eligibility for tax credits to a taxpayer for an eligible business facility (place of business) with regard to which such taxpayer has prior to July 1, 1983 received from the New York State Job Incentive Board initial approval of an application for such certificate by such Board as evidenced by the minutes of the meeting of the Board at which such application was approved."

On October 12, 1990, petitioners requested a joint conference before the Bureau of Conciliation and Mediation Services to contest the Division's denial of their request for EBF tax credits for the 1989 fiscal year.

On October 15, 1990, petitioners filed their tax returns for the 1989 fiscal year. CIBC claimed an EBF tax credit of \$416,260.00 and CIBC-NY claimed an EBF tax credit of \$3,556,132.00 for the 1989 fiscal year. Each of the petitioners disclosed in its tax return that the Division had denied its request for EBF tax credits for the 1989 fiscal year and that it was contesting such denial.

On August 7, 1991, a conciliation conference was conducted by Sareve Dukat, Conciliation Conferee, at the offices of the Bureau of Conciliation and Mediation Services, Brooklyn, New York.

On September 17, 1991, petitioners each submitted an Affidavit of Compliance for a Certificate of Eligibility for EBF tax credits for the fiscal year ended October 31, 1990 (the "1990 fiscal year").

By letters dated September 30, 1991 and October 1, 1991, respectively, the Division again notified CIBC-NY and CIBC that it would not grant their requests for EBF tax credits because the location at 425 Lexington Avenue was not an approved facility.

On October 15, 1991, petitioners filed their tax returns for the 1990 fiscal year. Petitioners did not claim EBF tax credits for the 1990 fiscal year; however, petitioners stated in their tax returns that they were seeking reinstatement of the EBF tax credit in a proceeding

before the Bureau of Conciliation and Mediation Services and that they intended to file refund claims in the event the credit was reinstated.

On November 22, 1991, the Bureau of Conciliation and Mediation Services issued a Conciliation Order to each of the petitioners denying their requests for EBF tax credits and upholding the determination of the Division.

By petitions dated February 19, 1992 (DTA Nos. 810520 and 810521), petitioners noted that they claimed EBF tax credit for the fiscal year ended October 31, 1989 disclosing at the same time that they intended to contest the denials of their requests to renew their certificates of eligibility. Petitioners further noted that as of the date of the petitions, they had not received their respective notices of deficiency with respect to the 1989 tax year.

In its respective answers dated April 13, 1992, the Division asserted that:

"the Commissioner of Taxation has authority to issue Certificates of Eligibility to a petitioner for years at issue only for the facilities covered in its initial application for participation in the JIB."

On May 27, 1993, petitioner CIBC filed a petition (DTA No. 811925) and Canadian Imperial Holdings, Inc. filed a petition on behalf of CIBC-NY (DTA No. 811924). Attached to each petition was a Notice of Deficiency dated March 1, 1993. In its petition, Canadian Imperial Holdings, Inc. noted that the Notice of Deficiency addressed to it included a deficiency of \$3,556,132.00 attributable to CIBC-NY's denied certificate of eligibility for the 1989 tax year because it filed a combined return with CIBC-NY. Similarly, CIBC noted in its petition that the Notice of Deficiency addressed to it included the denied EBF tax credit of \$416,260.00 for the 1989 tax year. Both petitioners further noted that CIBC-NY and CIBC already had filed petitions with respect to the claimed EBF tax credits for the 1989 and 1990 tax years. Both parties stated that the two petitions involve the identical issues that were asserted in the two prior petitions and that the latter petitions were filed to protect their rights.

SUMMARY OF THE PARTIES' POSITIONS

The Division argues that the Tax Commissioner does not have the authority to issue a certificate of eligibility for a business facility that is different from the facility that was

approved by the Job Incentive Board on petitioners' initial application. The Division claims that its position is supported by the decision in Matter of Sofco, Inc. (Tax Appeals Tribunal, July 3, 1991) and the 1989 regulations. The Division further contends that the 1989 regulations merely clarify the law governing the JIB tax credits and that the regulations are consistent with the legislative intent behind the 1983 changes in the administration of the JIB which was to "wind down the program."

Petitioners argue that the denial of the renewed certificate of eligibility is not required by the statute; that petitioners' successor facility met all the requirements to qualify for renewal of the certificate of eligibility; that the 1989 regulations may not be given retroactive effect and, in any event, have no application to petitioners' case and are contrary to the legislative purpose and intent underlying the EBF tax credit; that the denial is contrary to the express policy in effect on March 31, 1983 as well as the spirit and intent of the Legislature in establishing the credit; that the Tax Appeals Tribunal's decision in Matter of Sofco, Inc. (*supra*) is distinguishable on the facts; and that the Tribunal's decision in Matter of Columbia Mutual Life Insurance Co. (Tax Appeals Tribunal, August 4, 1988) supports petitioners' position.

CONCLUSIONS OF LAW

A. In 1968, the Legislature passed a bill adding a new Article 4-A to the Commerce Law creating a New York State Job Incentive Board which was empowered to grant tax credits to eligible business facilities. The purpose of the eligible business facility tax credit was:

"to encourage industrial and other business enterprises to locate, expand and improve facilities in economically underprivileged urban areas and to provide job opportunities and job training programs for residents of such areas" (L 1968, ch 1054, § 1).

In the Governor's Memorandum approving the bill, it was stated that:

"[i]n addition to building or expanding in such an urban core area, a business, to be eligible, will be required to add or retain five or more jobs for residents of the area, operate an approved job training program for such residents, and provide continuing job opportunities for such residents" (Governor's Bill Jacket, L 1968, ch 1054).

Section 118 of the Commerce Law set forth the requirements for eligibility for the tax credit and section 1115(c) defined the "eligible" areas for the location of the business facility

subject to the credit. Section 117 of the Commerce Law empowered the JIB to adopt rules and regulations consistent with the law, to determine and designate eligible areas as defined in section 115(c), to issue, modify or revoke certificates of eligibility, and to "actively promote" the use of the statutory provisions "so as to aid and assist business development."

B. In 1983, the Legislature repealed Article 4-A of the Commerce Law and amended the Tax Law authorizing the former State Tax Commission (now the Commissioner of Taxation and Finance [hereinafter referred to as "Tax Commissioner"]) to administer the phase-out of the program (Governor's Bill Jacket, L 1983, ch 15, eff April 1, 1983).

Tax Law § 1456(b)(8) empowered the Tax Commissioner, on or after April 1, 1983:

"to issue a certificate of eligibility for tax credits to a taxpayer for an eligible business facility with regard to which such taxpayer has, prior to July first, nineteen hundred eighty-three, received from the New York state job incentive board initial approval of an application for such certificate by such board as evidenced by the minutes of the meeting of the board at which such application was approved . . . and to renew, extend, revoke or modify a certificate of eligibility for tax credits, pursuant to section one hundred twenty of the commerce law as such section existed on March thirty-first, nineteen hundred eighty-three."

In 1989, the Division promulgated regulations with respect to Tax Law § 1456 and the 1983 changes to the job incentive program (20 NYCRR Appendix 1). The regulations define "eligible business facility" as follows:

"a place of business which meets the requirements of section 118 of the Commerce Law as such section existed on March 31, 1983. It is the business facility at the identical location with regard to which a taxpayer has received initial approval"

C. Petitioners contend that the 1989 regulations are inconsistent with the legislative intent underlying the EBF tax credit, are out of harmony with the statute and, in any event, may not be retroactively applied in this case. Petitioners claim that the statutory reference to the date of March 31, 1983 in Tax Law § 1456(b)(8) prohibits the Division from enforcing the "identical location" requirement of the 1989 regulations because such a requirement was not imposed by the statutory provisions in effect on March 31, 1983. These arguments are unpersuasive.

An agency may not adopt regulations that are inconsistent or out of harmony with the statute (see, Matter of McNulty v. New York State Tax Commn., 70 NY2d 788, 522 NYS2d

103, 104). With respect to petitioners' argument that the 1989 regulations are out of harmony with the legislative intent underlying the EBF credit, the 1983 repeal of Article 4-A of the Commerce Law itself is out of harmony with the establishment of the JIB. Contrary to petitioners' arguments, the purpose of the 1989 regulations was to codify the policy underlying the 1983 repeal and phase-out of the JIB and not to codify the policy underlying the initial creation of the JIB in 1968. The Tax Commissioner's authority under Tax Law § 1456(b)(8) must be considered within the entire legislative directive to repeal Article 4-A of the Commerce Law and to authorize the Tax Commissioner under such Tax Law sections as section 1456(b)(8) to phase-out the program. The 1983 amendments to the Tax Law concerning the repeal and phase-out of the JIB were enacted as part of a budget bill, the purpose of which was to address the fiscal concerns of the State's budget (Governor's Bill Jacket, L 1983, ch 15).

Petitioners argue that the 1989 regulations have improperly narrowed the definition of an eligible facility. Petitioners reason that the reference in Tax Law § 1456(b)(8) to Commerce Law § 120 as it existed on March 31, 1983 meant that the law must be applied as it existed on March 31, 1983 and that the phase-out never intended to remove existing participants from the program.

An interpretation or construction of a statute by the agency charged with its administration will be upheld if it is not irrational or unreasonable (Matter of Lumpkin v. Dept. of Social Services, 45 NY2d 351, 408 NYS2d 421, 423). Limiting eligible facilities to those that were initially approved by the JIB is consistent with the phase-out of the program. The Tax Commissioner's authority to phase-out -- to renew or revoke certificates -- under section 1456(b)(8) is only with respect to existing participants inasmuch as no new participants were accepted after July 1, 1983. Hence, the Tax Commissioner reasonably read his statutory authority under section 1456(b)(8) to renew certificates only for facilities previously approved by the JIB.

Moreover, the Tax Appeals Tribunal's decision in (Matter of Sofco, Inc., supra) is consistent with the 1989 regulation. In Sofco, the Tribunal noted that the entire JIB was

"framed in terms of the facility for the credits, not the taxpayer (Commerce Law, art 4-A, § 115-121)." The Tribunal further stated that:

"it is clear that the Legislature did not intend the Commissioner to apply the elaborate and detailed eligibility requirements to determine if new facilities met the requirements of the program as that would obviously be inconsistent with the legislative intent to abolish the program."

The Tribunal's holding in Sofco supports the reasonableness of the 1989 regulation with respect to eligible facilities notwithstanding that the facts in Sofco are distinguishable. These facts are distinguishable to the extent that the new or successor facility in Sofco was not located in an area found to be eligible by the JIB, whereas, here, the parties stipulated that the Lexington Avenue premises are located in the same eligible area in which the original facilities were located (see, Finding of Fact "24"). However, it is not apparent in the Tribunal's holding in Sofco that its determination rested on the fact that the successor facility was not located in an area found to be eligible by the JIB. The Tribunal makes no reference to this fact, which is only referenced by the Administrative Law Judge in the underlying determination (Conclusion of Law "E"). Instead, the Tribunal broadly stated the general principle that:

"[a] taxpayer could continue to receive the credits only for 'an eligible business facility' for which an application for credits had previously been approved by the Job Incentive Board 'for such facility'."

D. With respect to petitioners' argument that the 1989 regulations may not be applied retroactively to the facts in this case, the retroactive application of a regulation must be measured against the policy of the statute it seeks to interpret and the principle of equity (see, SEC v. Chenery Corp., 332 US 194, 203, 91 L Ed 1995 [1947]).

"Ordinarily, if a new regulation or interpretation merely recites settled prior law or policy, then retroactive application of the regulation or interpretation is proper. If, however, the new regulation or interpretation overrules prior law or policy, the new regulation or interpretation will not, depending on various factors, be given retroactive effect. This distinction is obviously grounded upon notions of fairness to the involved parties" (Sam v. U.S., 682 F2d 925, 932 [Ct Cl 1982], cert denied 459 US 1146, 74 L Ed 2d 993 [1983]).

As noted above, the 1989 regulation follows the policy underlying the 1983 changes to the JIB which was to end the program and phase-out existing participants. The Tax Commissioner carried out that policy by limiting eligibility on renewal to those facilities that

were initially approved by the JIB. As noted in Sofco, the entire framework of the program focused on the facility and not the taxpayer. The 1983 changes allowed those taxpayers who already had JIB approval of eligible facilities to retain tax credits if they continued to meet the requirements in effect on March 31, 1983 -- hence, the reference to the law in effect on March 31, 1983. However, the reference to this date did not mean that the Tax Commissioner must renew a certificate for a new facility if that facility met the requirements under the law in effect on March 31, 1983. Inasmuch as the program primarily targeted facilities and not a taxpayer, a new facility is similar to a new participant which the Legislature clearly intended to eliminate with the repeal and phase-out of the program. Thus, the 1989 regulations reinforce the intended policy underlying Tax Law § 1456(b)(8).

E. The petitions of Canadian Imperial Bank of Commerce, Canadian Imperial Bank of Commerce - New York and Canadian Imperial Holdings, Inc. are denied and the notices of deficiency dated March 1, 1993 are sustained.

DATED: Troy, New York
August 5, 1993

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE